

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN HARPER and LANA KUDINA, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 COLDWELL BANKER BARBARA SUE )  
 SEAL PROPERTIES and PYRAMID )  
 HOMES INCORPORATED, )  
 )  
 Defendants. )  
 \_\_\_\_\_)

No. CV-06-1457-HU

FINDINGS & RECOMMENDATION

John Harper  
 Lana Kudina  
 P.O. Box 16566  
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Plaintiffs Pro Se

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Attorney for Defendant Coldwell Banker Barbara  
 Sue Seal Properties

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1 - FINDINGS & RECOMMENDATION

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3 Vancouver, Washington 98666-0570

4 Attorney for Defendant Pyramid Homes, Inc.

5 HUBEL, Magistrate Judge:

6 Plaintiffs John Harper and Lana Kudina filed an action against  
7 defendants in the Superior Court of the State of Washington, Clark  
8 County. On October 16, 2006, plaintiffs removed that action to  
9 this Court. In an October 30, 2006 Findings & Recommendation, I  
10 recommended that defendants' motions to remand the action back to  
11 state court be granted. I also recommended that should the Article  
12 III District Court Judge adopt the Findings & Recommendation,  
13 defendants be awarded attorney fees and costs under 28 U.S.C. §  
14 1447(c).

15 In a December 20, 2006 Order, Judge Brown adopted the October  
16 30, 2006 Findings & Recommendation. She granted defendants'  
17 motions to remand and granted defendants' request for attorney's  
18 fees and costs.

19 Defendants now move for awards of fees. I recommend that the  
20 motions be granted in part and denied in part.

21 As stated in the October 30, 2006 Findings & Recommendation,  
22 section 1447(c) allows an order remanding a case to require payment  
23 of "just costs and any actual expenses, including attorney fees,  
24 incurred as a result of the removal."

25 In determining a reasonable attorney's fee, the district court  
26 first calculates the lodestar by multiplying the number of hours it  
27 finds the prevailing party reasonably expended on the litigation by  
28 a reasonable hourly rate. Caudle v Bristow Optical Co., Inc., 224

1 F.3d 1014, 1028 (9th Cir. 2000). There is a strong presumption  
2 that the lodestar figure is a reasonable fee. Gates v. Deukmejian,  
3 987 F.2d 1392, 1397 (9th Cir. 1992). The presumptively reasonable  
4 lodestar figure may be adjusted downward or upward only on the  
5 basis of those factors not already subsumed in the lodestar  
6 calculation. Morales v. City of San Rafael, 96 F.3d 359, 363-64  
7 (9th Cir. 1996), amended on other grounds, 108 F.3d 981 (9th Cir.  
8 1997). "The subsumed factors are: the novelty and complexity of  
9 the issues, the special skill and experience of counsel, the  
10 quality of the representation, the results obtained and the  
11 superior performance of counsel." D'Emanuele v. Montgomery Ward &  
12 Co., 904 F.2d 1379, 1383 (9th Cir. 1990) (citations omitted),  
13 overruled on other grounds, Burlington v. Dague, 505 U.S. 557  
14 (1992).

15 A. Reasonable Hourly Rate

16 In determining the reasonable hourly rate, the court must look  
17 at the "prevailing market rates in the relevant community." Blum  
18 v. Stenson, 465 U.S. 886, 895 (1984). The court determines what a  
19 lawyer of comparable skill, experience, and reputation could  
20 command in the relevant community. Id. at 895 n.11; see also  
21 Robins v. Scholastic Book Fairs, 928 F. Supp. 1027, 1333 (D. Or.  
22 1996) ("In setting a reasonable billing rate, the court must  
23 consider the 'prevailing market rates in the relevant community'  
24 and determine what a lawyer of comparable skill, experience, and  
25 reputation could command in the relevant community."), aff'd, 116  
26 F.3d 485 (9th Cir. 1997). The fee applicant has the burden of  
27 producing satisfactory evidence, in addition to the affidavits of  
28 its counsel, that the requested rates are in line with those

1 prevailing in the community for similar services of lawyers of  
2 reasonably comparable skill and reputation. Jordan v. Multnomah  
3 County, 815 F.2d 1258, 1263 (9th Cir. 1987).

4 This Court starts its analysis of a reasonable hourly fee by  
5 looking to the Oregon State Bar Economic Survey ("OSB Survey")<sup>1</sup>.  
6 E.g., Frederickson v. Consolidated Supply Corp., No. CV-05-1704-BR,  
7 2006 WL 752587, at \*3 (D. Or. Mar. 21, 2006) (noting that court  
8 uses bar survey as initial benchmark and that attorneys may argue  
9 for higher rates based on inflation, specialty, or other factors).

10 1. Coldwell Banker Barbara Sue Seal Properties

11 Although Martha Hodgkinson is listed as the attorney of record  
12 for Coldwell Banker, another attorney in the firm, Calliste Korach,  
13 performed the majority of work on the remand motion. In her  
14 affidavit, Korach states she was admitted to practice law in Oregon  
15 in 1999 and her practice focuses primarily on professional  
16 liability defense. Korach Affid. at ¶ 13. Her current rate is  
17 \$125 per hour. Id.

18 The OSB Survey shows that the average billing rate in 2002,  
19 for Portland attorneys with 7-9 years of experience, was \$176 per  
20 hour. Even unadjusted for inflation, Korach's \$125 hourly rate is  
21 well below the average. This is a reasonable rate.

22 Nowhere in Coldwell Banker's motion and supporting materials  
23 can I find, however, a stated rate for Hodgkinson. It is  
24 inexcusable for experienced counsel practicing in this Court to  
25 fail to delineate the hours per attorney and the requested rate for  
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27 <sup>1</sup> Available at:  
28 [www.osbar.org/surveys\\_research\\_econsurv02/econsurvey02.html](http://www.osbar.org/surveys_research_econsurv02/econsurvey02.html).

1 each attorney.

2 My calculation shows that Hodgkinson's rate is \$155 per hour.  
3 See Exh. A to Korach Affid. at p. 10 (Hodgkinson charged \$31 for  
4 0.2 hours of work; using these figures produces an hourly rate of  
5 \$155). Coldwell Banker's submission also fails to include any  
6 information regarding the length of time Hodgkinson has been  
7 practicing law. While it is easy enough to guess at these facts  
8 from Hodgkinson's Oregon State Bar number in the bar directory, or  
9 from earlier pleadings in the case which bear her name and bar  
10 number, attorneys who practice elsewhere before coming to Oregon  
11 suffer from such speculation. This was another omission that  
12 should be in the fee request. Assuming that Hodgkinson's bar  
13 number of 86209 correctly suggests she was admitted in 1986, then  
14 as of 2006, she had been practicing for 20 years.

15 Hodgkinson's rate of \$155 per hour is extremely reasonable.  
16 The OSB Survey shows that in 2002, the average rate charged by  
17 Portland practitioners with twenty years of experience was \$213 per  
18 hour, well above Hodgkinson's 2006 rate.

19 The rates charged by Coldwell Banker's counsel are reasonable.

## 20 2. Pyramid Homes

21 Three different attorneys provided services to Pyramid Homes  
22 in this case: Albert Schlotfeldt, Quinn Posner, and Curtis Welch.  
23 Exh. A to Schlotfeldt's Affid. They were assisted by paralegal  
24 Kesa Knudsvig.

25 Schlotfeldt seeks an hourly rate of \$215. Id. He practices  
26 primarily in the areas of real estate and construction litigation.  
27 Schlotfeldt Affid. at ¶ 1. He states that the fees sought are  
28 reasonable and customary for this area of litigation. Id. at ¶ 3.

1 He provides no information about the number of years he has been  
2 practicing law, again leaving it to the Court to deduce that  
3 information from his 90115 bar number.

4 The OSB Survey shows that the average rate for a Portland  
5 attorney with sixteen years of experience is \$213 per hour. Even  
6 without making an adjustment for inflation, Schlotfeldt's \$215  
7 hourly rate appears reasonable.

8 Pyramid Homes provides absolutely no information about either  
9 of the other two attorneys or the paralegal, other than to request  
10 \$200 per hour for Posner, \$210 for Welch, and \$95 for Knudsvig. I  
11 can deduce Posner's years of experience from his bar number which  
12 appears on the pleadings submitted in support of the attorney's fee  
13 request. The number, 05121, indicates he has one year of  
14 experience.

15 In 2002, the average hourly rate for attorneys with that level  
16 of experience was \$144 per hour. Adjusted for inflation<sup>2</sup>, this  
17 \$144 rate would be \$162.06 in 2006. Pyramid Homes offers no basis  
18 for adjusting this rate. \$162 per hour is a reasonable rate for  
19 Quinn.

20 The record contains no information about Welch's years of  
21 practice and because his name does not appear on any pleadings in  
22 the case, his bar number is not readily available from any court  
23 filings. I obtained his bar number from the bar directory but  
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25 <sup>2</sup> As seen in the Bureau of Labor Statistics website, the  
26 Consumer Price Index (Urban) for All Items shows an average  
27 inflation rate of 1.9% for 2003, 3.3% for 2004, and 3.4 percent  
28 for 2005. Available at:  
<ftp://ftp.bls.gov/pub/special.requests.cpi.cpiiai.txt>. For the  
purposes of this Findings & Recommendation, I assume that the  
inflation rate for 2006 will be 3.4%.

1 again, there is no excuse for experienced counsel to fail to  
2 include such information in a fee request. Based on an 87097 bar  
3 number, Welch appears to have been practicing for nineteen years in  
4 2006.

5 The OSB Survey indicates that in 2002, the average hourly rate  
6 for a Portland attorney with nineteen years of experience is \$213.  
7 Thus, even without adjusting for inflation, Welch's requested rate  
8 of \$210 is reasonable.

9 Finally, I conclude that \$95 per hour for the paralegal time  
10 is reasonable.

#### 11 B. Reasonable Number of Hours

12 It is the fee claimant's burden to demonstrate that the number  
13 of hours spent was "reasonably necessary" to the litigation and  
14 that counsel made "a good faith effort to exclude from [the] fee  
15 request hours that are excessive, redundant, or otherwise  
16 unnecessary[.]" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983);  
17 see also Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d  
18 1545, 1557 (9th Cir. 1989) ("[p]laintiffs bear the burden of  
19 showing the time spent and that it was reasonably necessary to the  
20 successful prosecution of their [] claims."). Reasonable hours  
21 include only those for successful or closely related claims.  
22 Sloman v. Tadlock, 21 F.3d 1462, 1474 (9th Cir. 1994); see also  
23 Chalmers v. City of Los Angeles, 796 F.2d 1205, 1211 (9th Cir.  
24 1986) (district court determines number of hours reasonably  
25 expended in furtherance of the successful aspects of a litigation),  
26 amended, 808 F.2d 1373 (9th Cir. 1987).

#### 27 1. Coldwell Banker

28 By my calculations, Coldwell Banker seeks fees for 21.5 hours

1 of work by Korach, and 2.9 hours by Hodgkinson. I have reviewed  
2 the time entries and conclude that this is a reasonable number of  
3 hours given that (1) plaintiffs filed a baseless motion for  
4 sanctions against Pyramid Homes after they removed the case to this  
5 Court, which caused additional work for both defendants, (2)  
6 plaintiffs filed a Second Amended Complaint without leave of court  
7 and without defendants' consent, after the motions to remand were  
8 filed, and after the filing of the Findings & Recommendation  
9 recommending that the motions to remand be granted, which also  
10 caused additional work by both defendants, and (3) because there  
11 was no Magistrate Judge consent, the parties were faced with a  
12 second round of briefing on the objections to the Findings &  
13 Recommendation.

## 14 2. Pyramid Homes

15 Pyramid Homes seeks fees for 7.5 hours spent by Schlotfeldt,  
16 26.8 hours spent by Posner, .35 hours spent by Welch, and 3.9 hours  
17 spent by Knudsvig. While the time requested by Welch and Knudsvig  
18 is reasonable, there are a few billing entries by the other counsel  
19 that do not appear to have been incurred as a result of the  
20 removal, and thus, I do not award them here.

21 Those entries are:

22 (1) 0.2 hours by Posner on October 20, 2006, for time spent  
23 receiving, reviewing, and analyzing correspondence from plaintiffs  
24 requesting discovery and settlement negotiations;

25 (2) 0.2 hours by Schlotfeldt on October 20, 2006, for  
26 receiving and examining a letter from plaintiffs regarding  
27  
28



1 discovery<sup>3</sup>;

2 (3) 0.2 hours by Schlotfeldt on October 25, 2006, for  
3 receiving and examining information on Harper;

4 (4) 0.4 hours by Posner on October 25, 2006, for researching  
5 the corporation status of plaintiffs in Washington and Oregon in  
6 order to determine the presence of property to attach future  
7 judgment; and

8 (5) 0.2 hours by Schlotfeldt on October 30, 2006, for  
9 receiving and examining a letter from Coldwell Banker's counsel to  
10 Harper demanding dismissal.

11 The problem with these entries is that they are not  
12 specifically tied to the proceedings in federal court but are  
13 actions that would likely have been undertaken by counsel even if  
14 the case had remained pending in state court. Thus, they are not  
15 properly awarded under section 1447(c).

16 Next, I deduct 0.5 hours from the 1.0 sought by Posner on  
17 October 27, 2006, for time spent receiving, reviewing, and  
18 analyzing plaintiffs' response to the motion to remand. The filing  
19 was 5½ pages, with an additional 3 pages of exhibits and copies of  
20 two very short cases appended. Reasonably, it should have taken no  
21 more than thirty minutes to evaluate this filing, which is the  
22 amount of time spent by counsel for Coldwell Banker on this task.

23 Finally, I deduct 0.7 hours of time spent by Posner on  
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25 <sup>3</sup> The entries on this date appear duplicative and while the  
26 client may opt to pay more than one counsel to perform a review  
27 of correspondence, the time spent by both attorneys is not  
28 equitably shifted to plaintiffs in this case. Thus, if these  
entries were related to the fact that the case was pending in  
federal court as a result of a meritless removal, I would allow  
the time for only one attorney, not both.

1 November 13, 2006, for reviewing and analyzing plaintiffs'  
2 objection to the Findings & Recommendation, and 0.2 hours spent by  
3 Posner on November 16, 2006, for time spent receiving and reviewing  
4 correspondence by the court regarding new filings. I deduct this  
5 time, consistent with the reasons explained in footnote 3, because  
6 in each case, both Posner and Schlotfeldt appear to have billed for  
7 time spent on the same task and it is inequitable to shift fees for  
8 both counsel to plaintiffs. Only one lawyer was needed for this  
9 task. See Exh. B to Schlotfeldt Affid. at p. 6 (the day after  
10 Posner billed 0.7 hours for reviewing and analyzing plaintiffs'  
11 objections to the Findings & Recommendation, Schlotfeldt billed 0.6  
12 hours for examining filings by Harper), and p. 7 (the day after  
13 Posner billed 0.2 hours for receiving and reviewing correspondence  
14 from federal court regarding new filings, Schlotfeldt billed 0.2  
15 hours for receiving and examining notice from federal court). I  
16 award the time to Schlotfeldt, the more senior attorney.

17 After making the appropriate deductions, I conclude that the  
18 reasonable number of hours for Schlotfeldt is 6.9, for Posner is  
19 24.4, for Welch is .35, and for Knudsvig is 3.9.

20 C. Calculation of the Lodestar

21 The total award for Coldwell Banker is \$3,137 (21.5 hours x  
22 \$125 per hour for Korach produces a total of \$2,687.50; 2.9 hours  
23 x \$155 per hour for Hodgkinson produces a total of \$449.50;  
24 together, these figures equal \$3,137)<sup>4</sup>.

25 The total award for Pyramid Homes is \$5,880.30 (6.9 hours x  
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27 <sup>4</sup> Coldwell Banker's motion seeks a total of \$3,214. I  
28 believe I am awarding all hours requested at the rates requested  
and cannot ascertain the source of the discrepancy.

1 \$215 per hour for Schlotfeldt produces a total of \$1,483.50; 24.4  
2 hours x \$162 per hour for Posner produces a total of \$4,341.60; .35  
3 hours x \$210 per hour for Welch produces a total of \$73.50; and 3.9  
4 hours x \$95 per hour for Knudsvig produces a total of \$370.50;  
5 together, these figures equal \$5,880.30).

6 D. Costs

7 Coldwell Banker seeks \$10 in costs for a November 7, 2006  
8 delivery to this Court. Although Korach declares that the cost  
9 incurred is correct and was necessarily incurred in the action,  
10 there is no information as to what was delivered and why it was  
11 necessary to hand deliver the material. The docket sheet reflects  
12 no pleadings or other submissions filed by Coldwell Banker on that  
13 date and there does not appear to have been any urgency related to  
14 any filing so as to justify the cost for a hand delivery to the  
15 Court. Because Coldwell Banker fails to fully substantiate the  
16 necessity in incurring this cost, I decline to award it.

17 CONCLUSION

18 I recommend that defendant Coldwell Banker's motion for fees  
19 (#33) be granted in the amount of \$3,137, and I further recommend  
20 that defendant Pyramid Homes's motion for fees (#29) be granted in  
21 part and denied in part and that Pyramid Homes be awarded  
22 \$5,880.30. I also recommend that Coldwell Banker's Cost Bill  
23 (#32), be denied.

24 SCHEDULING ORDER

25 The above Findings and Recommendation will be referred to a  
26 United States District Judge for review. Objections, if any, are  
27 due March 1, 2007. If no objections are filed, review of the  
28 Findings and Recommendation will go under advisement on that date.

1 If objections are filed, a response to the objections is due  
2 March 15, 2007, and the review of the Findings and Recommendation  
3 will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 14th day of February, 2007.

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8 /s/ Dennis James Hubel  
9 Dennis James Hubel  
United States Magistrate Judge  
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